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DEPARTMENT OF HEALTH AND HUMAN SERVICES
PUBLIC HEALTH SERVICE
NATIONAL INSTITUTES OF HEALTH

RECOMBINANT DNA ADVISORY COMMITTEE
WORKING GROUP ON INTERNATIONAL PROJECTS

MINUTES OF MEETING[1]

FEBRUARY 1, 1988

The Working Group on International Projects, Recombinant DNA Advisory Committee, was convened at 9:00 a.m. on February 1, 1988, at the National Institutes of Health, Building 31C, Conference Room 10, 9000 Rockville Pike, Bethesda, Maryland 20892. Dr. Mitchell Cohen was Chair. The following were present for all or part of the meeting.

Working Group members:

Don Bert Clewell	Robert Lanman	William J. Gartland
Mitchell Cohen	Gerard McGarrity	(Executive Secretary)
Susan Gottesman	Monica Riley	
Edward Korwek	Anne Vidaver	

The working group roster is attached (Attachment I).

Other National Institutes of Health staff:

Robin Atkiss, NCI
Becky Lawson, NIAID

Others:

Carter Blakey, Federation of American Societies for Experimental Biology
Charles Eby, Hill and Knowlton
A. S. Lubiniecki, Genentech, Inc.
Charles Marwick, Journal of the American Medical Association
Fran Pollner, Medical World News
Reginald Rein, McGraw-Hill World News
Janet Shoemaker, American Society for Microbiology
Edwin Shykind, Department of Commerce
Lisa White, Blue Sheet

[1]The working group is advisory to the Recombinant DNA Advisory Committee, and its recommendations should not be considered as final or accepted.

Dr. Cohen called the meeting to order at 9 a.m. He cited the proposal of the Foundation on Economic Trends and Mr. Jeremy Rifkin to amend Section I-C of the National Institutes of Health (NIH) Guidelines for Research Involving Recombinant DNA Molecules regarding research projects conducted abroad (Attachment II). The Recombinant DNA Advisory Committee (RAC) considered the proposal at its meeting on September 21, 1987, and recommended establishment of a working group to consider further issues associated with projects conducted outside of the United States. Dr. Cohen said that there was general dissatisfaction with the proposed amendment at the RAC meeting.

Dr. Gartland then reviewed the current applicability of Section I-C of the NIH Guidelines. Mr. Lanman cited the words "projects" and "supported by NIH funds" in Section I-C. He stated that the field trial of a recombinant rabies vaccine in Argentina was separable from NIH support for the portion of the project carried out in the U.S.; the field trial in Argentina was not supported by NIH.

Dr. Gottesman said that the first issue is whether the working group is comfortable with the position the NIH has taken on the field trial in Argentina. Dr. Korwek said that this is a very difficult problem, and he is unhappy about attempting to apply U.S. rules in foreign countries. He said that there may be ways to circumvent any proposed language crafted by the working group.

Dr. Riley raised the issue of countries that have not adopted their own guidelines. Dr. Gottesman said that the issue concerns activities that may be viewed as an extension of an NIH project. She also noted that the concern is about release into the environment of recombinant organisms.

Dr. Clewell then proposed the following sentence:

> "In situations where the NIH may not be directly funding the testing abroad of products developed using NIH monies (e.g., vaccines, drugs, insecticides, etc.), formal approval by the ministry of health (or equivalent) of the involved country is required. Such countries should require compliance with the NIH Guidelines or a set of equivalent guidelines."

Dr. Gottesman was not sure about requiring formal approval by the ministry of health. Dr. Riley liked the idea of bringing projects to the attention of local authorities.

Mr. Lanman said that the key issue is "support;" NIH has no authority if there is no NIH support for a project. Regarding Dr. Clewell's proposal, Mr. Lanman raised the scenario of a university that sells the rights to a product to a company; the product is now fairly far removed from NIH support. He suggested focusing on institutions that receive NIH support for recombinant DNA research. The NIH Guidelines could be made to apply to all recombinant DNA research conducted at the institution.

Dr. Cohen raised a concern about situations in which a principal investigator is a collaborator in a project conducted abroad. Dr. Shykind of the Department of Commerce said that there would have to be a cut off time at some point in the progress of a project. Dr. Cohen stated that a board determines if the level of informed consent is adequate in international projects conducted by the Centers for Disease Control.

Dr. Cohen suggested that researchers could notify NIH of proposed international research. Dr. Gottesman questioned whether this would be just for certain classes of research. Dr. Vidaver questioned what NIH would do with the information. Dr. Korwek raised the issue of when does NIH support begin and end.

Dr. Gartland stated he could discern at least four levels of activity at the international level: (1) exchange of research materials when there is no intent to collaborate, (2) exchange of research materials with an intent to collaborate but NIH funds are not expended in the foreign country, (3) exchange of research materials with intent to collaborate and expenditure of NIH funds in the foreign country, and (4) award of an NIH grant or contract to an institution in a foreign country. The third and fourth cases are clearly already covered by the NIH Guidelines.

Dr. Clewell suggested focusing on "release" experiments; Dr. Vidaver suggested focusing on "first release" experiments. Mr. Lanman raised the issue of which institution would be the responsible institution.

Dr. Cohen expressed concerns about attempting to extend the NIH Guidelines to foreign countries; perhaps there could be a statement that foreign governments should be notified regarding field trials.

Dr. Gartland questioned how any such proposal would affect private companies which voluntarily comply with NIH Guidelines. Dr. Vidaver suggested that there should be a notification requirement.

After further discussion and drafting of language, the working group voted 7 in favor, none opposed, and no abstentions to publish for comment the following proposed revision of the third paragraph of Section I-C of the NIH Guidelines:

> "The NIH Guidelines are also applicable: (1) to projects done abroad if they are supported by NIH funds or (2) to research done abroad if it involves deliberate release into the environment or testing in humans of materials containing recombinant DNA developed with NIH funds and the research is a direct extension of the development process. If the host country, however, has established rules for the conduct of recombinant DNA projects then a written assurance of compliance with those rules may be submitted to NIH in lieu of compliance with the NIH Guidelines. Alternatively, if the host country does not have such rules, written acceptance by an appropriate government office of the host country is necessary in lieu of compliance with the NIH Guidelines. The NIH reserves the right to withhold funding if the safety practices to be employed abroad are not reasonably consistent with the NIH Guidelines."

The meeting was adjourned at 1:30 p.m.

William J. Gartland, Jr., Ph.D.
Executive Secretary

I hereby acknowledge that, to the best of my knowledge, the foregoing Minutes and Attachments are accurate and complete

Date: _____

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January 9, 1987

Dr. James B. Wyngaarden
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Dr. William Gartland
Director
NIH Office of Recombinant Activities
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Dear Drs. Wyngaarden and Gartland:

In response to your (Dr. Wyngaarden's) letter of December 22, 1986, regarding the Wistar Institute's field testing of the recombinant rabies vaccine in Argentina, we have serious problems with your legal and factual analyses and disagree with your conclusions.

Assuming, arguendo, the correctness of your interpretation of Section 1-C of the NIH Guidelines, as set out in your letter of December 22nd, the facts are not adequate to support the conclusion that Section 1-C was not violated here.

The letter of December 5, 1986, from Dr. Koprowski, to which you refer, does not, of itself, provide any assurance that there was no NIH funding of the Argentina deliberate release. That letter states, in support of its conclusion that the field testing "was not supported by NIH funds," only that "[t]he funds were obtained from two private sources." An obvious question -- not answered on the record -- is whether the "two private sources" obtained their funding or any part thereof used in the experiment from NIH. Certainly, if NIH funds were used by such entities to support the Argentina testing, then there has been a violation of the Guidelines. Follow-up inquiries on this issue

are essential to determine if there was a violation of the Guidelines.

You also state that review of the files "of NIH grant 2-R37-A1-09706-16 . . . verified that neither the grant application nor progress reports mention field testing in Argentina." We assume that this is intended to suggest that if such field testing was not contemplated, field testing was not part of the "project." However, previous years' grant applications and progress reports by Wistar for the development of this vaccine may disclose that field testing was contemplated, yet your letter fails to deal with them.

Furthermore, a broader inquiry would have disclosed that such field testing was contemplated. The April 1986 issue of Research Resources Reporter, an NIH publication, contained a lengthy article on Wistar's rabies vaccine research which described the field test later carried out in Azul, Argentina. That report, then, contradicts the notion that field testing was not contemplated as a part of the project.

Finally, Wistar's admitted role in providing the vaccine to PAHO -- the vaccine used in the Argentina experiment -- developed through NIH funding (of over $3 million), compels the conclusion that, on the facts, the Argentina tests were conducted with NIH funding. Nothing in the language or underlying policies of the Guidelines suggests that the NIH funding of a project abroad within the meaning of Section 1-C excludes in-kind NIH contributions or grants such as, for example, equipment or supplies, and here, the vaccine itself.

In the light of the foregoing points, we request that NIH furthur investigate and review the facts and reconsider its factual analyses upon which it based its decision that the Argentina experiment was not supported in whole or part by NIH funding and that those field tests did not violate the NIH Guidelines and, after such reconsideration, reverse that decision.

Aside from the factual basis for our conclusion above, based on your interpretation of Section 1-C, that interpretation is legally flawed. Its artifically narrowed concept of what constitutes NIH funding of a project fails to comport with the definition of federal agency action as used in the National Environmental Policy Act, applicable regulations, and the relevant case law. An agency action includes those activities and their effects which are "reasonably forseeable." 40 C.F.R. § 1508.08. The resulting responsibilities of the agency for a project "cannot be escaped by disingenuously describing it as

only an amalgamation of unrelated smaller projects." National Wildlife Fed. v. Appalachian Reg. Com'n., 677 F.2d 883, 888 (D.C. Cir. 1981). In short, because field testing was contemplated -- reasonably forseeable -- NIH's attempt to disassociate its funding actions from the resulting field tests flies in the face of the facts and applicable law.

The NIH is compelled to interpret its Guidelines in accord with the foregoing NEPA directives and policies: "The Congress . . . directs that, to the fullest extent possible, . . . the policies, regulations and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in [NEPA]." NEPA Section 102(1), 42 U.S.C. § 4332(1).

In the light of the foregoing analyses, we request that NIH reconsider and reverse its interpretation of Section 1-C of the Guidelines that led it to conclude that the Argentina experiment was not supported in whole or part by NIH funding and that those field tests did not violate the NIH Guidelines.

Your letters of December 9th and 22nd suggest that if we do not agree with your interpretation of Section 1-C of the NIH Guidelines, a petition to changes its provisions would be considered. The Foundation on Economic Trends and Jeremy Rifkin hereby petition the NIH to change Section 1-C as follows:

Add after the first sentence of the third paragraph the following sentences:

> For the purposes of the preceding sentence, the term "project" includes any research or development of the recombinant organism or other product or process in question, including all such work that is reasonably forseeable when the NIH support is received. NIH support includes both money grants and any type of in-kind support, including research conducted directly by NIH, supplies, equipment, the use of facilities, and biological research materials. NIH support has been given where the source of funds or in-kind support is, directly or indirectly, the NIH.

In our letters to you of November 25, 1986, and December 4, 1986, we requested your interpretation of the Guidelines on the Wistar issue promptly. However, because you chose not to disclose your interpretation of Section 1-C until after you had made your factual investigation of the matter, we did not receive that interpretation until after the closing date for the agenda of the next RAC meeting on February 2, 1987. Accordingly, because of the urgency of corrective action on your

interpretation -- because it may allow any number of pending deliberate release experiments to be conducted abroad to escape compliance with the Guidelines -- we request a supplemental Federal Register Notice on the meeting placing our proposed amendment on the agenda. As you are aware, there is precedent for such supplemental notices and additions to a RAC agenda. In the alternative, we request the scheduling (and notice) of another RAC meeting within 30 days after February 2, 1986, with this item on the agenda.

By making these requests for changes to Section 1-C, we are not waiving our rights to seek other forums for relief from what we consider to be your arbitrary and capricious interpretation of that provision in its present form; that interpretation is not only inconsistent with the spirit and purposes of the Guidelines, including the other provisions of Section 1-C, as we previously noted, but also conflicts with applicable federal environmental law.

Sincerely yours,

Edward Lee Rogers
Counsel for the
Foundation on Economic
Trends and Jeremy Rifkin